IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-915

ALVIN BROUSSARD
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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INDEX

CASE CITATIONS

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The petitioner, ALVIN BROUSSARD, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on October 11, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, as yet unreported, appears at Appendix A.

JURISDICTION

The judgment of the United States Court

of Appeals, Fifth Circuit, was rendered on October 11, 1978. Petitioner duly filed a petition for rehearing in said Court on October 25, 1978, which was denied by order of said Court on November 8, 1978, which appears at Appendix B. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Is an Assistant United States Attorney's express agreement with a defendant in consideration of a two count guilty plea that the Government will not thereafter prosecute him for any other marijuana related offenses occurring prior to said plea, without any specific reference or limitation to any particular district, specifically enforceable by said defendant in another district?

2. Whether a Trial Court's written Finding of Fact as to the existence of a Government agreement not to further prosecute a defendant, required by Rule 12E, F.R.Crim.P. to be made of record when a factual issue exists on a Motion to Dismiss, should be held to be modified or overruled by a subsequent oral remark by the Trial Court at the time of a guilty plea.

3. Where a Trial Court affirmatively advises a defendant immediately prior to his guilty plea that the maximum special parole term he can be sentenced to is two years, may the Trial Court thereafter sentence the defendant to a special parole term of twenty years?

CONSTITUTIONAL PROVISION AND FED. RULES OF CRIM. PROCEDURE INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . ,nor be deprived of life, liberty, or property, without due process of law . . ."

FED. RULES OF CRIM. PROCEDURE, RULE 12(e)

> "Ruling on Motion. . . Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

FED. RULES OF CRIM. PROCEDURE, RULE 11(c)

> "Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possibile penalty provided by law."

STATEMENT OF FACTS

Petitioner was indicted herein in the Western District of Texas on numerous counts, all of which were marijuana related offenses occurring prior to April 4, 1977. He timely filed a Motion to Dismiss said indictment upon the grounds that an Assistant United States Attorney for the Northern District of Texas, on April 4, 1977, made an agreement

with him that in consideration of a two count guilty plea the Government would not thereafter prosecute him for any other marijuana related offenses occurring prior to said plea. Evidence was heard on said Motion and the Magistrate's Findings of Fact, adopted by the Court, were as follows:

> "The record indicates that the testimony of the plea bargain agreement was that the government would not prosecute for any marijuana or amphetamine violations occurring prior to the date of the defendant entering the plea of guilty to the 2-count information." (¶6, Findings of Fact)(R.71)
>
> "The evidence reveals, and the record supports, that counsel for the defendant and the defendant intended the plea bargain agreement would cover all acts of the defendant up to and including the date of his entering a plea of guilty to the information in the Northern District of Texas." (¶9, Findings of Fact)(R.72)

Though the Trial Court had theretofore denied said Motion to Dismiss, at the time Petitioner pled to the indictment herein, the Trial Court, apparently because said ruling was troubling his conscience, repeatedly orally attempted to justify his denial of said Motion to Dismiss (R. Vol. II, Item 33, p.22) and repeatedly orally attempted to extract from Petitioner's counsel and finally from Petitioner himself, a waiver of his right to raise on appeal the denial of said Motion to Dismiss (R. Vol. II, Item 33, p.16-17).

The Trial Judge admonished Petitioner

as to the maximum penalty herein as follows:

> "I believe you have also been advised that the maximum penalty that could be imposed is a five year term of imprisonment, plus a $15,000 fine, plus a two year Special Parole term in the event any prison sentence is imposed; the two year Special Parole term, however, could last for as long as your life.
>
> Now, do you understand what you are charged with and what the maximum penalty could be?" (Vol. II, Item 33, p.16)

The prior advice referred to by the Trial Judge also failed to state that the special parole term could exceed two years and was, in fact, calculated to lead Petitioner to believe the term of the special parole could not exceed two years (Vol. II, Item 33 p.5). In addition, the written plea agreement in the case was read in open Court, containing the following:

> "I understand that the maximum punishment for these offenses [is] five years imprisonment, a $15,000 fine, and a special parole term of two years." (R. Vol. II, Item 33, p.7)

The Court thereafter sentenced Petitioner to a special parole term of twenty years.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has rendered a decision herein in conflict with the en banc

decision of the United States Court of Appeals, 4th Circuit, in U. S. vs. Carter 454 Fed. 2d 426.

The Trial Court's conclusions, which have been upheld by the 5th Circuit herein, were that the prosecution was not barred by the prior agreement simply because there was no specific mention of the "Western District of Texas", and the U. S. Attorney did not consult with anyone from the office of the U. S. Attorney in the Western District nor with anyone from the U. S. Department of Justice (Findings of Fact, R.73-74). Said holding is in direct conflict with the en banc decision of the 4th Circuit in U.S. vs. Carter, supra., wherein the Court states:

> "[2] . . . The only distinction between Paiva and the instant case is that in Paiva the bargain was breached in the district in which it was made while here the bargain was allegedly breached in a neighboring district. We think this a distinction without a difference. The United States government is the United States government throughout all of the states and districts. If the United States government in the District of Columbia, acting through one of its apparently authorized agents, promised that the sole prosecution against defendant would be the misdemeanor charge in that jurisdiction, and defendant relied on the promise to his prejudice--facts which must be proved in the plenary hearing if the indictment is to be dismissed--we will not permit the United States government in the Eastern District of Virginia to

> breach the promise.
>
> If there be fear that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.
>
> The judgment of conviction is vacated and the case remanded for evidentiary determination of the issue raised by the motion to dismiss. If the promise was made, relied upon and breached as alleged, the indictment should be dismissed."

The Government's contention that the guilty plea waived the agreement not to initiate the prosecution against the defendant is clearly negated by the decisions of this Court in Blackledge v. Perry 94 S.Ct. 2098, 417 U.S. 21 and Menna v. N.Y. 96 S.Ct. 241 (see footnote 2 in Menna).

The Government's contention that the Trial Court successfully extracted from the defendant an express waiver of his right to raise this question is negated by the record and particularly by the last statement on the subject made by his counsel, to-wit:

> "MR. HORNER: No, Your Honor. The plea bargain agreement, if the legal effect of that instrument is waiving that, he understands that. In other words, he is not just voluntarily saying if he does in fact have a right to raise it in the future that he is willing to waive it."
> (R. Vol. II, Item 33, p.24)

The Government's contention that Petitioner's negative reply to the question asked him by the Court at the time of his two count plea as to his plea being voluntary and without any promises other than dismissal of the indictment somehow expunged or rendered unenforceable the prosecutorial agreement in question is expressly overruled by the decision in U. S. vs. Minnesota Mining and Mfg. Co. 551 Fed.2d 1106, which holds that a prosecutorial agreement differs from a plea bargain in which the Trial Judge is a participant. Rule 11(e) F.R.C.P. on plea bargains relates only to agreements pertaining to disposition of the charges than pending before the Court and sentence considerations, while whether to prosecute in the future is an executive function.

2. The decision below, by holding that the Trial Court concluded that the prior agreement was limited to dismissal of the indictment in the Northern District, contrary

to the express written Findings of Fact, has decided a Federal question in a way in conflict with the decisions of this Court that written special Findings of Fact cannot be modified or overruled by later statements by the Court as to his conclusions or opinions.

This Court has made the following holdings which are directly in conflict with the decision of the Court of Appeals herein:

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the Findings."
> Stone v. U.S. 164 U.S. 380, 17 S.Ct. 71, 41 L.Ed. 477

> "The special findings may not be aided by statements in the conclusions of law or the opinion of the court."
> U. S. v. Esnault-Pelterie 57 S.Ct. 159

The only theory upon which the Court of Appeals herein could have stated that the Trial Court concluded that the agreement was limited to the Northern District, in the face of the specific Findings of Fact in paragraphs 6 and 9 thereof, is that advanced by the Government in its brief wherein it quotes the oral remarks of the Trial Judge at the time of the guilty plea (Appellee's Br. p.8). Said oral remarks of the Trial Judge at the guilty plea, made long after he had read the record of the evidence at the Motion to Dismiss, made and entered his written Findings of Fact thereon, and denied said Motion, was merely evidence of failing memory. If the above-quoted holdings of the Supreme Court of the United States are ignored and said oral remark

considered along with said Findings of Fact, then the Findings of Fact are, at the most, inconclusive, and the decision in Haywood vs. U. S. 393 Fed. 2d 780 (5th Cir.) requires a remand for clarification instead of an affirmance.

3. In holding that Rule 11(c)(1) F.R. Crim.P. neither requires the Trial Court upon a guilty plea to advise a defendant of the maximum special parole term that may be imposed upon him nor prohibits an affirmative misstatement to the defendant of said maximum special parole term, the Court of Appeals herein has decided an important question of Federal law as to guilty pleas which has not been, but should be, settled by this Court.

As shown in the statement of facts above, the defendant was advised three times immediately prior to his guilty plea that the maximum special parole term that could be assessed against him was two years. Though the Trial Judge did in one instance advise him that said special parole term of two years may be for life, such did not alter his clear statement that the maximum term would be two years. The Court of Appeals herein holds as it recently did in U. S. vs. Adams, 5th Cir. 1978, 566 Fed. 2d 962-969, that Rule 11 no longer requires an explanation of the special parole term because the 1975 amendment no longer requires advising the defendant of the "consequences" of his plea but now only requires advising him as to the mandatory mimumum penalty and the maximum possible penalty. Prior to the said Adams decision the Courts have uniformly held that the maximum special parole term must be clearly explained to the defendant. Hamilton vs. U.S.

553 Fed. 2d 63; Watson vs. U. S. 548 Fed. 2d 1058; Rodriguez vs. U. S. 545 Fed. 2d 75; Roberts vs. U. S. 491 Fed. 2d 1236. Even if the Adams case is correct, and we submit it is not, such decision merely upheld the omission of advice as to the maximum special parole term and does not in any way seek to justify an affirmative misstatement of same.

Whether the 1975 amendment of said Rule 11 has wrought such a radical reduction of a defendant's rights at the time of a guilty plea is a question of critical importance that should be immediately settled by this Court.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted:

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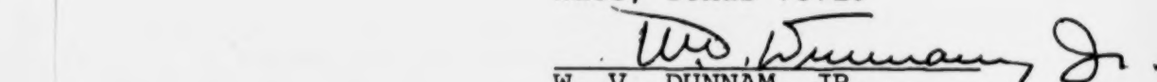

W. V. DUNNAM, JR.

CERTIFICATE

I hereby certify that 3 true copies of the foregoing Petition for Writ of Certiorari has been duly mailed to counsel for the United States of America, Hon. Le Roy Morgan Jahn, U. S. Attorney's Office, United States

Courthouse, 655 E. Durango Blvd., Suite G-13, San Antonio, Texas 78206, and Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 5th day of December, A.D. 1978.

W. V. DUNNAM, JR.

APPENDIX A

UNITED STATES v. BROUSSARD

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alvin BROUSSARD,
Defendant-Appellant.
No. 78–5319
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1978.

Defendant was convicted before the United States District Court for the Western District of Texas, at San Antonio, Adrian A. Spears, Chief Judge, of conspiracy to import marijuana, and he appealed. The Court of Appeals held that: (1) evidence sustained finding that prior plea agreement respecting an earlier indictment against defendant on separate drug charges was limited to a dismissal of indictment charging conspiracy to import marijuana, amphetamines and cocaine, and did not preclude defendant's prosecution on other marijuana-related offenses occurring before the date of prior plea agreement, and (2) record indicated that trial judge adequately explained consequences of defendant's guilty plea

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

with regard to parole and that defendant understood such explanation.

Affirmed.

1. Criminal Law — 273.1(2)

Evidence sustained finding that prior plea agreement respecting an earlier indictment against defendant on separate drug charges was limited to a dismissal of indictment charging conspiracy to import marijuana, amphetamines and cocaine, and did not preclude defendant's prosecution on other marijuana-related offenses occurring before the date of prior plea agreement.

2. Criminal Law — 273.1(4)

On appeal from defendant's conviction on guilty plea to charge of conspiracy to import marijuana, record indicated that trial judge adequately explained consequences of defendant's guilty plea with regard to parole and that defendant understood such explanation. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

Alvin Broussard appeals the conviction on his plea of guilty in the district court for the Western District of Texas to

the charge of conspiracy to import marijuana in violation of 21 U.S.C. §§ 952(a) and 963. Broussard claims that the indictment against him violated the terms of a prior plea agreement and also asserts that the district judge failed to comply with Rule 11, Fed.R.Crim.P. in accepting his guilty plea. After a thorough review of the record, we find both contentions meritless and affirm the conviction.

[1] The fate of appellant's first claim turns on the scope of a plea bargain made by him with the United States Attorney for the Northern District of Texas respecting an earlier indictment on separate drug charges. That indictment alleged Broussard's participation in a conspiracy to import marijuana, amphetamines and cocaine from Mexico into the United States. The government agreed to drop the indictment in return for Broussard's plea of guilty to a two count information charging him with misprision of a felony and constructive marijuana possession. Appellant contends, however, that the government also promised not to prosecute him on any marijuana related offenses occurring before April 4, 1977, the date of the prior plea agreement. He asserts that his indictment in the instant case, based on activities that allegedly took place before the date, violated the terms of the earlier bargain, thereby requiring reversal of his conviction and dismissal of all current charges. The district judge, aided by the findings and recommendations of a magistrate, gave careful consideration to this argument, and the record amply supports his conclusion that the prior plea agreement was limited to dismissal of the indictment charging a conspiracy to import marijuana, amphetamines and cocaine, then pending in the Northern District of Texas. The Assistant United States Attorney who negotiated the agree-

ment testified to that effect at the hearing on appellant's motion to dismiss the indictment in this case. Furthermore, when the district judge who accepted Broussard's plea of guilty to the information in the earlier prosecution asked the defendant in open court whether he had received any promises from the government other than dismissal of the pending indictment above referred to, he replied "[t]hat's all."

[2] Appellant's second assertion of error runs counter to both the record and the law of this circuit. Broussard claims that the district judge violated Rule 11, Fed.R.Crim.P. when accepting his guilty plea in this case by failing to inform him accurately of the maximum special parole term. However, the record plainly indicates both the judge's explanation and appellant's express understanding of the consequences of his guilty plea with regard to parole. Moreover, this court has recently held that Rule 11 no longer requires such an explanation of the special parole term. *United States v. Adams*, 5 Cir. 1978, 566 F.2d 962, 969.

AFFIRMED.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

November 8, 1978

TO ALL PARTIES LISTED BELOW:

NO. 78-5319 - UNITED STATES OF AMERICA vs. ALVIN BROUSSARD

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Sally Hayward
Deputy Clerk

cc: Messrs. Fred J. Horner, III
W. V. Dunnam, Jr.
Ms. LeRoy Morgan Jahn

No. 78-915

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN BROUSSARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 582 F. 2d 10.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. A petition for rehearing was denied on November 8, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on December 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's prosecution in the Western District of Texas was barred by a prior plea agreement in the Northern District of Texas.

2. Whether the district court adequately advised petitioner at the time he pleaded guilty of the maximum special parole term that could be imposed.

STATEMENT

An indictment filed in the United States District Court for the Western District of Texas on November 14, 1977, charged petitioner and three co-defendants with conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963, and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. On March 2, 1978, pursuant to a plea agreement, petitioner pleaded guilty to conspiracy to import marijuana. He was sentenced to five years' imprisonment and 20 years' special parole. The court of appeals affirmed (Pet. App. A).

In December 1976, petitioner had been indicted in the Northern District of Texas on charges of conspiring to import marijuana, amphetamines, and cocaine from Mexico into the United States. He entered into a plea agreement whereby the government agreed to dismiss that indictment in return for petitioner's plea of guilty to an information charging him with misprision of a felony and constructive possession of marijuana. Petitioner then pleaded guilty to the information on April 4, 1977, stating to the court that the only promise made by the government in return for his guilty plea was the dismissal of the indictment (Pet. App. A-4). The trial judge approved the plea agreement and, on April 29, 1977, sentenced petitioner to four months' imprisonment on one charge and probation on the other.

Petitioner moved to dismiss the present indictment on the ground that, as part of the earlier plea agreement in the Northern District of Texas, the government had agreed not to prosecute him on any other federal drug

offenses committed prior to the date of the plea.[1] A United States Magistrate held an evidentiary hearing on the motion on January 6, 1978, at which petitioner's attorney and Jay Ethington, Assistant United States Attorney for the Northern District of Texas, testified about the terms of the plea agreement entered in that District. The evidence showed that while awaiting preparation of the superseding information to which petitioner had agreed to plead guilty, petitioner's counsel told Ethington that petitioner would not enter the plea unless it was agreed that the guilty plea would "clean his slate * * * as far as any marijuana related * * * offenses" (H. 62-63).[2] Ethington agreed that if petitioner were to plead guilty, he would not "turn around and indict [petitioner] the next day" (H. 7)—that is, that petitioner would not be further indicted in the Northern District of Texas (H. 8). Although petitioner's counsel was aware of an investigation of other offenses committed by petitioner pending in the Western District of Texas, he did not mention it to Ethington or otherwise seek to include those offenses in the plea agreement (H. 9, 63-65). Ethington had no knowledge of that investigation and did not agree that petitioner would not be subject to future prosecutions in other districts (H. 7-10).

Based on the foregoing testimony, and on petitioner's statement in the Northern District of Texas that no promises other than dismissal of the indictment in that district had been made,[3] the magistrate found that the

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[1]The present indictment alleges acts committed prior to April 4, 1977, the date petitioner entered his plea in the Northern District.

[2]"H." refers to the transcript of the January 6, 1978, hearing on petitioner's motion to dismiss. "M." refers to the seven-page Findings of Fact by the United States Magistrate. "Tr." refers to the transcript of the March 2, 1978, Rule 11 proceeding.

[3]When he pleaded guilty in the Northern District of Texas, petitioner was asked, "Has anyone made any promises to you other than the dismissal of the indictment that you have been charged with heretofore?" Petitioner answered, "That's all" (M. 2).

government had agreed only to dismiss the indictment then pending in the Northern District (M. 4). On February 27, 1978, the district court adopted the magistrate's findings and denied petitioner's motion to dismiss the indictment. On March 2, 1978, pursuant to a plea agreement, petitioner pleaded guilty to the count in the indictment charging a conspiracy to import marijuana.[4]

In taking petitioner's guilty plea in the present case, the district court noted that the earlier plea agreement in the Northern District of Texas showed that defense counsel and the Assistant United States Attorney "had diametrically opposite views of what was said and what was done" (Tr. 18). The court stated that, had it found that the terms of the earlier plea agreement precluded further prosecution of petitioner in any district, it would have enforced that agreement against the government here (Tr. 22):

> If I had found on the basis of the record or if the Magistrate had found and I had concluded that there was an agreement and it just rested on whether or not the United States Attorney in the Northern District of Texas had the authority to bind every other United States Attorney in the country, I wouldn't have had any problem. I would have said "yes," because the cases hold that when one government official acts on behalf of the United States Government and he makes it broad enough to include everybody else, then they are all representing the same client, which is the government, and therefore, it would be binding upon everybody else.

But reviewing the testimony on petitioner's motion to dismiss the present indictment and the record of the prior guilty plea in the Northern District, the court found that the agreement was to dismiss only the indictment pending at the time of the plea in the Northern District (Tr. 18-19).

[4]A second indictment pending against petitioner in the Western District of Texas was dismissed as part of the plea agreement in this case.

During the course of the Rule 11 proceeding, the prosecutor informed petitioner of the potential penalties that he faced and stated that two years' special parole was the minimum that could be imposed (Tr. 5-6). Additionally, the court advised petitioner as follows (Tr. 27):

> I believe you have also been advised that the maximum penalty that could be imposed is a five year term of imprisonment, plus a $15,000 fine, plus a two year Special Parole term in the event any prison sentence is imposed; the two year Special Parole term, however, could last for as long as your life.

Finally, the written plea agreement, containing the following language, was read in court (Tr. 7):

> I understand that the maximum punishment for these offenses [is] five years imprisonment, a $15,000 fine, and a special parole term of two years. I have had the special parole procedure explained to me, and I understand that I can be subject to a special parole to and including my natural life.

ARGUMENT

1. Petitioner contends (Pet. 5-8) that the prior plea agreement in the Northern District of Texas barred the instant prosecution in the Western District of Texas. But the magistrate, the district court, and the court of appeals each concluded that the terms of the prior plea agreement did not prohibit the instant prosecution, and the correctness of this concurrent finding of fact does not warrant further review. See, *e.g.*, *Berenyi* v. *Immigration*

Director, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[5]

In any event, the record does not support petitioner's contention, which rests upon an erroneous interpretation of the rulings below. Petitioner states (Pet. 6) that the district court concluded that the prior plea agreement did not bar the instant prosecution "simply because there was no *specific* mention of the 'Western District of Texas', and the U.S. Attorney did not consult with anyone from the office of the U.S. Attorney in the Western District nor with anyone from the U.S. Department of Justice." While those facts were included in the magistrate's findings (see M. 4), which the district court adopted, the court's conclusions did not rest on them alone. The court also found that it was the dismissal of the indictment in the Northern District of Texas that the plea agreement contemplated, that the prosecutor in the Northern District was unaware of the investigation pending in the Western District, and that he intended to bind only the Northern District as to subsequent prosecution of petitioner (M. 3-4).[6] Based on those findings, as well as the findings cited by petitioner, the court concluded that "the plea bargain agreement in the Northern District of Texas did not contain any agreement as to subsequent prosecutions in the Western District of Texas" (M. 4).[7] As the court of

[5]There is thus no need to consider the question (Pet. 7-8) whether petitioner's guilty plea bars this appeal. The court of appeals affirmed the conviction on the merits (Pet. App. A-3 to A-4).

[6]None of the overt acts alleged or co-conspirators named in the instant indictment was the same as those in the indictment dismissed in the Northern District.

[7]Petitioner also contends (Pet. 8-10) that the district court's conclusions are inconsistent with the findings of fact. He bases this assertion on the magistrate's findings (1) that "the testimony of the plea bargain agreement was that the government would not prosecute for any marijuana or amphetamine violations occurring prior to the date of [petitioner's] entering the [prior] plea of guilty * * *" (M.3)

appeals correctly held (Pet. App. A-3), "the record amply supports [the district court's] conclusion that the prior plea agreement was limited to dismissal of the indictment * * * then pending in the Northern District of Texas." Cf. *United States* v. *Pihakis*, 545 F. 2d 973 (5th Cir.), cert. denied, 434 U.S. 818 (1977); *United States* v. *Alessi*, 544 F. 2d 1139 (2d Cir.), cert. denied, 429 U.S. 960 (1976).[8]

2. Petitioner also contends (Pet. 10-11) that the district court erroneously advised him that the maximum term of special parole that could be imposed was two years. Although the court did state at one point that the maximum penalty included a "two year Special Parole term," it immediately added that "the two year Special Parole term, however, could last for as long as your life" (Tr. 27). While the court's statements are somewhat inconsistent, petitioner also was told by the prosecutor

and (2) that petitioner and his counsel subjectively intended that the agreement would cover all of petitioner's acts up to the date of the plea (M.4). While the magistrate's findings are not a model of clarity, the first fact cited, when considered in context, refers to those offenses charged in the indictment dismissed in the Northern District. Accordingly, the factual findings are consistent with the court's conclusions. With regard to the second finding, a defendant's mistaken subjective impressions as to the consequences of his guilty plea ordinarily do not provide sufficient grounds to set aside the plea. See *Masciola* v. *United States*, 469 F. 2d 1057, 1059 (3d Cir. 1972); *United States ex rel. Curtis* v. *Zelker*, 466 F. 2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973). Such unexpressed impressions are not part of the plea agreement; if petitioner misunderstood the terms of the Northern District plea bargain, his remedy is to seek relief in that court, not to bootstrap his interpretation of that agreement into a bar of the present indictment.

[8]Petitioner's reliance (Pet. 6-7) on *United States* v. *Carter*, 454 F. 2d 426 (4th Cir. 1972), is misplaced. In that case, the defendant moved to dismiss the indictment, alleging that it violated a prior plea agreement, but the district court denied the motion without a hearing to determine whether the agreement in fact existed. The court of appeals remanded for a hearing. Here, by contrast, the district court held a full hearing and resolved the issue on factual grounds.

that two years was the *minimum* special parole term that could be imposed (Tr. 5-6), and the written plea agreement, which was read aloud during the Rule 11 proceeding, stated unequivocally that petitioner "under[stood] that [he could] be subject to a special parole to and including [his] natural life" (Tr. 7). As the court of appeals observed (Pet. App. A-4), "the record plainly indicates both the judge's explanation and [petitioner's] express understanding of the consequences of his guilty plea with regard to parole."[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
KATHERINE WINFREE
Attorneys

FEBRUARY 1979

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[9]Citing its earlier decision in *United States* v. *Adams*, 566 F. 2d 962,969 (5th Cir. 1978), the court of appeals also noted that "Rule 11 no longer requires such an explanation of the special parole term" (Pet. App. A-4). Regardless of whether that holding is correct (see, *e.g.*, *United States* v. *Del Prete*, 567 F. 2d 928, 929 (9th Cir. 1978)), it does not affect the court of appeals' conclusion that petitioner was informed at the time he pleaded guilty that the special parole term could last as long as he lived. See Pet. App. A-4. We note in addition that petitioner does not allege that he was in fact unaware of the maximum possible special parole term when he entered his plea.

DOJ-1979-02

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-915

ALVIN BROUSSARD, PETITIONER

VERSUS

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF THE UNITED STATES

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ATTORNEYS FOR PETITIONER
ALVIN BROUSSARD

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Government in its brief and the United States Court of Appeals in its opinion have failed to draw the line that actually exists between the Findings of Fact and the Conclusions of Law.

The factual findings are:

(1.) "the testimony of the plea bargain agreement was that the government would not prosecute for any marijuana or amphetamine violations occurring prior to the date of the defendant entering the plea of guilty to the 2-count information." (Par. 6, Findings of Fact; R. 71)

(2.) "the record supports, that counsel for the defendant and the defendant intended the plea bargain agreement would cover all acts of the defendant up to and including the date of his entering a plea of guilty to the information in the Northern District of Texas." (Par. 9, Findings of Fact: R. 72)

Thereafter, the Magistrate made the immaterial findings that there was no specific mention of the Western District of Texas, as was shown by the undisputed evidence, that the United States Attorney did not consult with anyone from the office of the United States Attorney in the Western District nor with anyone from the United States Department of Justice, that the prosecutor in the Northern District was unaware of the investigation pending in the Western District, and that he intended to bind only the Northern District as to subsequent prosecution of Petitioner, and from said facts the Magistrate ***concluded as a matter of law that "the prior plea agreement (that was found in par. 6, supra.) was limited to dismissal of the indictment in the Northern District.***

By reason of the agreement factually found in the above paragraphs 6 and 9 of the Findings of Fact, *(U. S. vs. Carter* 454 F. 2d 426 specifically requires dismissal of the indictment herein regardless of the immaterial facts that there was no specific mention of the Western District, that the United States Attorney failed to consult anyone from the Western District nor from the Department of Justice, and that he intended to bind only the Northern District. The attempt of the Government and Court of Appeals to modify said written factual findings of said agreement and defendant's reliance thereon by the Court's mere conclusion that by reason of said additional immaterial facts such agreement was limited to the Northern District of Texas is in direct controvention of this Court's prior holdings that written Findings of Fact connot be modified or controlled by Conclusions of Law. ***Stone v. U. S.*** 164 U.S. 380, 17 S.Ct. 71, 41 L.Ed. 477; ***U.S. v. Esnault-Pelterie*** 57 S.Ct. 159.

Said findings of the agreement in paragraph 6 above was mandatory upon any conscientious trier of fact since U.S. Attorney Ethington, when recalled to the stand after hearing and having his memory refreshed by the unequivocal testimony of attorneys Canonico and Dunnam, admitted that he did not

actually remember the words used and that he had admitted over the phone that the testimony Dunnam had just given was substantially correct. (H. Mot. to Dis.) (R. 16 P. 19)

CONCLUSION

The right of a defendant to rely upon the word of a U.S. Attorney and the honor of the Government are at stake. Do not let them be eroded by a false construction of the Findings of Fact. The Petition for Writ of Certiorari should be granted and Petitioner accordingly so prays.

Respectfully submitted:

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Alvin Broussard, Petitioner

CERTIFICATE

I hereby certify that three true copies of the foregoing Reply have been duly mailed to counsel for the United States of America, Honorable Le Roy Morgan Jahn, U.S. Attorney's Office, United States Courthouse, 655 E. Durango Blvd., Suite G-13, San Antonio, Texas 78206, and Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 14 th day of February, A.D. 1979.

W. V. Dunnam, Jr. ATTY. A.G.

W. V. Dunnam, Jr. Attorneys for
Alvin Broussard, Petitioner